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March 9, 2001

FCC MAIL ROOM

Ms. Magalie Roman-Salas
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: CC Docket No. 96-45, DA 01-278

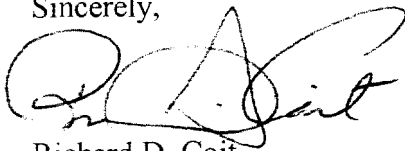
In the Matter of the Petition of Western Wireless Corporation for Designation as
an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South
Dakota

Dear Ms. Roman-Salas:

Enclosed please find one original and four copies of the Comments of the South Dakota Independent Telephone Coalition, Inc. in reference to CC Docket No. 96-45 in response to Public Notice DA 01-278. In accordance with the instructions in the Public Notice, three copies have also been sent to Sheryl Todd and an electronic disk copy has been sent to the Commission's copy contractor, International Transcription Service and copies have been sent to all other persons on the service list.

Thank you for your assistance.

Sincerely,



Richard D. Coit
Executive Director and
General Counsel

Attachments

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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MAR - 9 2001

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In the Matter of)
)
WESTERN WIRELESS CORPORATION)
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Petition for Designation as an Eligible)
Telecommunications Carrier for the)
Pine Ridge Reservation in South Dakota)

CC Docket No. 96-45
DA 01-278

**COMMENTS OF THE
SOUTH DAKOTA INDEPENDENT
TELEPHONE COALITION**

Richard D. Coit
General Counsel for
South Dakota Independent
Telephone Coalition

March 9, 2001

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I. INTRODUCTION

The South Dakota Independent Telephone Coalition, Inc. ("SDITC"), by and through its attorney, files these comments in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on February 2, 2001, in the above referenced docket.¹ By such Notice, the Commission has requested comments on a "Petition for Designation as an Eligible Telecommunications Carrier" filed by the Western Wireless Corporation ("WWC") pursuant to Section 214(e)(6) of the Federal Communications Act (hereinafter referenced as the "Federal Act" or "Act").

SDITC is an organization representing the interests of numerous independent, cooperative and municipal local exchange carriers in the State of South Dakota (attached as Appendix A hereto is a listing of the current SDITC member local exchange carriers "LECs"). All of the SDITC member LECs are "rural telephone companies" as defined in 47 U.S.C. § 153(37) and all have been designated as eligible telecommunications carriers ("ETCs") within their established "service areas" or "study areas."² As rural telephone companies that have already received ETC designation, that are committed to meeting universal service obligations within their service areas, all of the SDITC member LECs have a strong interest in this proceeding. The petition filed by WWC requires this Commission to interpret and apply the federal ETC provisions found in 47 U.S.C. § 214(e). The petition, in part, seeks from this Commission a determination as to whether it is in the "public interest" to designate more than one ETC in the Pine Ridge Reservation area.³

¹ *Common Carrier Bureau Seeks Comment on Western Wireless' Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, Public Notice, CC Docket 96-45, DA 01-278 (rel. February 2, 2001).

² 47 U.S.C. § 214(e)(5) provides that "[i]n the case of an area served by a rural telephone company, 'service area' means such company's 'study area' unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under Section 410(c), establish a different definition of service area for such company."

³ The Pine Ridge Reservation in South Dakota is for the most part in the service area of the Golden West Telecommunications Cooperative ("GWTC"). Other small areas within the Reservation are served by the Fort Randall Telephone Company ("Fort Randall") and Great Plains Communications. As shown on the attached

In addition, it includes a request “that the Commission designate Western Wireless’ ‘service area,’ for purposes of its universal service offering targeted to the Pine Ridge Reservation, to be identical to the geographic area of the Reservation.”⁴ SDITC, on behalf of its members, submits these comments to address these and other related issues that have the potential to affect the WWC ETC designation case still pending before the South Dakota Supreme Court, or affect future ETC related proceedings either before the FCC or the South Dakota Public Utilities Commission (“SDPUC”).⁵

With regard to the petition for ETC designation filed by WWC, SDITC opposes the petition for the following reasons: (1) it ignores the fact that ETC designation proceedings covering the entire State of South Dakota have already been initiated by WWC and are still pending at the state level; (2) it seeks designation in a service area that does not correspond with the established rural service areas or the “study areas” of the affected, existing rural telephone companies; (3) it fails to establish that WWC is “offering” all of the required telecommunications services, as contemplated by 47 U.S.C. § 214(e)(1), either throughout the established rural telephone company service areas or throughout the Pine Ridge Reservation; and (4) it fails to show that designating WWC as an additional ETC within the requested service area would be in the “public interest” as required by the provisions of 47 U.S.C. § 214(e)(2).

Appendix A, GWTC and Fort Randall Telephone, as South Dakota based companies are members of the SDITC. The operations of Great Plains Communications are run out of the State of Nebraska.

⁴ See *Western Wireless’ Petition for Designation as an Eligible Telecommunications Carrier*, dated January 19, 2001, p. 8 (hereinafter referenced as “WWC Petition”).

⁵ As of the date these comments, the WWC request for ETC designation filed with the SDPUC (seeking statewide ETC designation) is pending in appeal proceedings before the South Dakota Supreme Court, *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Appeal from the Circuit Court, Sixth Judicial Circuit, Hughes County, S.D., Case Nos. 21510, 21521, and 21525.

II. SUMMARY

In its Twelfth Report and Order issued in CC Docket 96-45 on June 8, 2000, this Commission took action to establish a framework for the resolution of ETC designation requests presented under Section 214(e)(6) of the Communications Act. A review of that Order indicates that the petition for ETC designation filed by WWC is clearly out-of-step with the specific process established by the Commission. A carrier cannot pursue designation with the FCC under Section 214(e)(6) if it has already initiated an ETC designation proceeding before the state commission. As this Commission is aware from other proceedings, WWC has already presented a request for ETC status to the South Dakota Public Utilities Commission ("SDPUC"). The request submitted at the state level seeks statewide ETC designation from the SDPUC and thus covers all of the Pine Ridge Reservation.

SDITC views the WWC filing before this Commission as a classic case of forum shopping and as a misuse of the Section 214(e)(6) process. State commissions, rather than the FCC, are given primary responsibility under federal law to make ETC designations. This delegation of authority was made by Congress based on its recognition that state commission's are better able to make the necessary factual determinations relating to state and local public interest issues. The instant filing by WWC under Section 214(e)(6) attempts to take the public interest review applicable to rural service areas away from the SDPUC and turns on its head the process envisioned by Congress for ETC designations.

The petition for designation filed by WWC, which is limited to seeking ETC status on the Pine Ridge Reservation, also, necessarily raises a question as to whether WWC as a competitive ETC can be assigned its own unique service area for purposes of the federal ETC provisions or whether its' service area for universal service support purposes must coincide with the service areas of the rural telephone companies that have already received ETC status. SDITC believes

that WWC's petition for designation is deficient on its face because it is tied to the incorrect assumption that this Commission under the federal ETC provisions may grant WWC a different service area. Under the current law, the Commission does not have such discretion.

The Commission has already addressed the issue of rural service areas for purposes of applying the federal ETC provisions and has specifically held that a competitive ETC in order to meet the ETC service obligations must offer the required telecommunications services throughout the rural telephone company's established service area. Based on this requirement, it is clear that WWC's petition must be dismissed. As of this time, the existing service areas of the rural telephone companies that serve the Pine Ridge Reservation are their "study areas" and these study areas include areas outside the Reservation boundaries. Accordingly, unless and until the study areas or existing rural service areas are properly changed pursuant to the provisions of 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207, WWC cannot properly pursue ETC designation based on a reservation-only universal service offering.

WWC claims that it "currently provides on the Pine Ridge Reservation all the services and functionalities supported by the federal universal service program as required by the FCC," implying that it has met the requirement stated in 47 U.S.C. § 214(e)(1) for an offering of the required telecommunications services throughout the requested service area. SDITC disputes this claim. Even if, *arguendo*, it is assumed that WWC could limit its universal service offering to the Pine Ridge Reservation (an area that is lesser than the current rural service areas or study areas), the petition indicates very clearly that WWC is not at this time offering its fixed wireless service throughout such area.

The language of 47 U.S.C. § 214(e)(1) requires an applicant for ETC designation to actually "offer" the services supported by the universal service mechanism, when ETC status is sought. WWC is seeking ETC designation based merely on a plan that it will at some

undetermined future date be offering all of the required services throughout the Reservation area. Such facts, limited to vaguely defined plans or promises, are insufficient to warrant the requested designation. ETC status may not be granted to carriers based merely on some future intent to offer the services throughout the requested service area.

Both federal and state law require that, before more than one ETC may be designated within any service area served by a rural telephone company, a finding must be made that designating an additional ETC in such area would be in the public interest. WWC, as the petitioning party in this case, has the burden of proof to show not only that it has met the ETC service obligations, but to also establish that its requested designation would be in the public interest. Neither SDITC nor any other party has the burden to disprove assertions that it would be in the public interest to designate WWC as an ETC. WWC carries the burden, and meeting such burden requires more than simply proclaiming the benefits of competition.

WWC claims that its designation would be in the public interest, but provides little, if any actual data, to support such claims. It appears, from the lack of information accompanying WWC's petition for designation, that the company feels it can simply rely on ETC designations it has received in other state proceedings and before this Commission. Or, that it is sufficient to simply claim that its designation is consistent with the pro-competitive objectives of the 1996 Telecommunications Act.

WWC views the ETC designation process as a process to be utilized to foster competition in rural areas. SDITC strongly disagrees with this view of the federal ETC provisions. Neither Sections 254 nor 214(e) of the Federal Act should be interpreted as a means of subsidizing competitive entry into rural areas that may not at this time efficiently support more than one provider of telephone services. The entry of other providers should be in response to economic realities in the marketplace and not based on federal universal service subsidies.

WWC's petition relies too heavily on the assumption that competition always translates to consumer benefits and does not include enough information to reliably determine that its designation as an additional ETC would be in the public interest. Until the Commission is presented with sufficient evidence to make an affirmative determination that rural area customers would not be harmed by the designation of WWC as an ETC, SDITC urges the Commission to conclude that the additional designation is not in the public interest.

Lastly, SDITC questions why this case has not been bifurcated to allow for a separate initial proceeding on the issue of whether this Commission has jurisdiction to properly address the petition for designation under Section 214(e)(6) of the Act. As described in the Commission's Twelfth Report and Order, the process under Section 214(e)(6) (as applied to carriers serving tribal lands) contemplates the release of a separate FCC order on the threshold jurisdictional issue and then a subsequent process taking no longer than six months on the merits of the request for ETC designation. Accordingly, the jurisdictional issue raised by WWC's petition should have been addressed under a separate notice and outside of the six-month timeline that has been proposed by the FCC for its decision on the merits of ETC designation request. The Commission has departed from its process as described in the Twelfth Report and Order and has established a comment process that does not permit adequate time to address the many issues involved. The limited 45 day process effectively precludes a full and fair hearing of all of the issues and in SDITC's view gives rise to due process concerns.

III. ARGUMENT

A. The process for FCC ETC designation under 47 U.S.C. § 214(e)(6) is not available to WWC given the already initiated state proceeding.

In its Twelfth Report and Order issued in CC Docket 96-45 on June 8, 2000, this Commission took action to establish a framework for the resolution of ETC designation requests

presented under Section 214(e)(6) of the Communications Act.⁶ The provisions contained in Section 214(e)(6) are expressly intended to authorize ETC designation by the Commission only in those instances where the carrier seeking designation is not subject to state jurisdiction.⁷ In the Twelfth Report and Order the Commission specifically outlined the procedures it would follow to determine whether its authority under Section 214(e)(6) to make ETC designations has been triggered, or in other words, the procedures it would use to determine whether a particular carrier seeking ETC status is, or is not, subject to state commission jurisdiction. Two different sets of procedures were adopted by the Commission, one that applies to “carriers serving non-tribal lands” and another that applies to “carriers serving tribal lands.” The process established by the Commission for “carriers serving tribal lands” is pertinent to the case at hand since WWC’s request for ETC designation under Section 214(e)(6) is limited to the Pine Ridge Reservation.

With respect to petitions for designation submitted under Section 214(e)(6) by “carriers serving tribal lands,” the process as described in the Commission’s Twelfth Report and Order is as follows:

Par. 120. . . . We conclude that a carrier seeking a designation of eligibility to receive federal universal service support for telecommunications service provided on tribal lands may petition the Commission for designation under section 214(e)(6), without first seeking designation from the appropriate state commission. The petitioner must set forth in its petition the basis for its assertion that it is not

⁶ Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, released June 30, 2000, in CC Docket No. 96-45, *In the Matter of Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*.

⁷ 47 U.S.C. § 214(e)(6) provides that “[i]n the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.”

subject to the state commission's jurisdiction, and bears the burden of proving that assertion.

Par. 121. Based on the evidence presented in the record, the Commission shall make a determination as to whether the carrier has sufficiently demonstrated that it is not subject to the state commission's jurisdiction. In the event the Commission determines that the state commission lacks jurisdiction to make the designation and the petition is properly before the Commission under section 214(e)(6), the Commission will decide the merits of the request within six months of release of an order resolving the jurisdictional issue. If the carrier fails to meet its burden of proof that it is not subject to the state commission's jurisdiction, the Commission will dismiss the request and direct the carrier to seek designation from the appropriate state commission. . . .

Par. 122. We emphasize that a carrier seeking a section 214(e)(6) designation for service provided on tribal lands must bear the burden of proof of demonstrating that it is not subject to the state commission's jurisdiction. As discussed above, we reject the contention that section 214(e)(6) provides the Commission with blanket authority to make all eligible telecommunications carrier designations over carriers providing service on tribal lands. . . . [W]e recognize that the issue of whether a state commission may exercise jurisdiction over a carrier providing service on tribal lands is a particularized inquiry guided by principles of tribal sovereignty, federal Indian law, and treaties, as well as state law. . . .

Par. 125. We emphasize, however, that this process is limited in several respects. First, a carrier may avail itself of this process only to seek a designation of eligibility to receive federal universal service support for service provided on tribal lands. . . .

Par. 126. Second, a carrier may only avail itself of this process when it has not initiated a designation proceeding before the affected state commission. In order to avoid the potential for "forum shopping" and the costs and confusion caused by a duplication of efforts between this Commission and state commissions, we will not make a jurisdictional determination under section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2). Nothing we adopt today affects the ability of a state commission to make an eligible telecommunications carrier designation for a carrier serving tribal lands, where jurisdiction may otherwise be in dispute among the parties.

Par. 127. Finally, any determination made by this Commission pursuant to section 214(e)(6) relates only to a carrier's eligibility to receive federal universal service support for the provision of service on tribal lands. . . .

Emphasis added.

A review of the foregoing indicates that the petition for designation filed by WWC is clearly out-of-step with the process established by the Commission. The specific language emphasized above, included in Paragraph 126 of the Commission's Order, makes it very clear that a carrier cannot pursue designation with the FCC under Section 214(e)(6) if it has already initiated an ETC designation proceeding before the state commission. As this Commission is aware from other proceedings, WWC has already presented a request for ETC status to the SDPUC.⁸ The request submitted at the state level seeks statewide ETC designation from the SDPUC and thus covers all of the Pine Ridge Reservation.⁹ Although the SDPUC in its process denied ETC designation to WWC, its decision was subsequently overturned by an order of the State Circuit Court, Sixth Judicial Circuit.¹⁰ The judgment of the State Circuit Court has been appealed by both the SDPUC and SDITC to the South Dakota Supreme Court and its enforcement has been stayed pending resolution of the appeal. The parties have completed all briefing and argument before the State Supreme Court, and SDITC believes, based on past experience with the Court, that a decision can be expected soon.

Under this Commission's Twelfth Report and Order, no filing for designation under Section 214(e)(6) is permitted if a proceeding for such designation has already been initiated at the state level. This requirement as established by the Commission is consistent with the general recognition that "state commissions have the primary responsibility for the designation of eligible

⁸ See *In the Matter of the Federal-State Joint Board on Universal Service, Western Wireless Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, CC Docket 96-45, Declaratory Ruling, FCC 00-248.

⁹ See *In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, SDPUC Docket TC98-146, Findings of Fact and Conclusions of Law; Notice of Entry of Order dated May 19, 1999.

¹⁰ *The Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Civ. #99-235, Findings of Fact, Conclusions of Law and Order, dated March 22, 2000.

telecommunications carriers under section 214(e)(2).”¹¹ As further stated by the Commission in paragraph 104 of the Twelfth Report and Order:

[i]n light of the statutory framework and legislative history, we conclude that Congress, in enacting section 214(e)(6), did not intend to alter the basic framework of section 214(e), which gives the state commissions the principal role in designating eligible telecommunications carriers under section 214(e)(2). This interpretation of section 214(e) is consistent with the legislative history, which indicates that section 214(e)(6) is not intended to “restrict or expand the existing jurisdiction of State commissions over any common carrier,” but is intended to provide a means for the designation of a carrier over which a state commission lacks jurisdiction.¹²

If the Commission intends to hold firm to the intent behind the Section 214(e)(6) provisions, it should follow its earlier requirement established in the Twelfth Report and Order and, based thereon, take action immediately dismissing the WWC filing. The SDPUC has already held proceedings on a petition for ETC designation filed by WWC that seeks designation throughout the entire State, including the Pine Ridge Reservation. In these proceedings, the SDPUC never gave any indication that it lacked authority to grant a statewide designation, even

¹¹ See Twelfth Report and Order, FCC 00-208, ¶ 93.

¹² It is noteworthy that South Dakota Congressmen were engaged in debate on the legislation ultimately codified as 47 U.S.C. § 214(e) and specifically inquired as to the effect of the bill on state jurisdiction. The following excerpts from Senate and House floor discussions are pertinent:

Mr. Daschle: Would this bill have any effect on the existing jurisdiction of State commissions over new or incumbent local exchange carriers or providers of commercial mobile radio services?

Mr. McCain: No, this bill does nothing to alter the existing jurisdiction that state commissions already have over local exchange carriers or providers of commercial mobile radio services as set forth in section 332(c)(3) of the Communications Act . . .

Mr. Thune: . . . Am I correct in understanding that nothing in this bill is intended to expand or restrict the existing jurisdiction of State commissions over any common carrier or provider in any particular situation?

Mr. Bliley: Madam Speaker, the gentleman is correct, . . .

141 Cong. Rec. S12568, Nov. 13, 1997; and 141 Cong. Rec. H.10808-09, Nov. 13, 1997.

though it would extend to tribal lands.¹³ A state circuit court has already ruled on WWC's state-filed petition and made a determination that WWC meets the service offering and advertising requirements established under Section 214(e)(1) for the entire state.¹⁴ The SDPUC, pursuant to its ETC designation authority under 47 U.S.C. § 214(e)(2) and also under state statute, has also already granted ETC status to both GWTC and Fort Randall for their existing service areas including the areas which fall within the Pine Ridge Reservation.¹⁵ GWTC and Fort Randall, like WWC, are non-tribal carriers. In addition, the SDPUC has already taken action to designate the Cheyenne River Sioux Tribal Telephone Authority ("CRST"), a tribally owned carrier, as an ETC within its entire service area in South Dakota.¹⁶ In its Twelfth Report and Order, the Commission also specifically addressed the validity of this SDPUC designation in the context of ruling on a separate petition for ETC designation filed by CRST under Section 214(e)(6) of the Federal Act. The Commission concluded that CRST's petition under Section 214(e)(6) should be dismissed, finding no reason to disturb the South Dakota Commission's designation of CRST as an eligible telecommunications carrier.¹⁷ In reaching this conclusion, the Commission referenced an earlier Public Notice outlining the designation process under Section 214(e)(6), noting that its decision to

¹³ In addition to the provisions of Section 214(e)(2) giving state commissions ETC designation authority, South Dakota Codified Laws ("SDCL"), Section 49-31-78 expressly provides for SDPUC action on ETC designation petitions and the statute contains no exception relating to tribal lands. The statute reads as follows:

The commission shall designate a common carrier as an eligible telecommunications carrier for a service area designated by the commission consistent with 47 U.S.C. § 214(e) as of January 1, 1998. The commission may permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier consistent with 47 U.S.C. § 214(e)(4) as of January 1, 1998. The commission may designate a common carrier or carriers to provide service to unserved areas that request such service consistent with 47 U.S.C. § 214(e)(3) as of January 1, 1998. The commission may not in an area served by a rural telephone company designate more than one eligible telecommunications carrier absent a finding that the additional designation would be in the public interest.

¹⁴ Findings of Fact, Conclusions of Law, and Order, Civ. 99-235, Sixth Judicial Circuit, pp. 6 and 10.

¹⁵ See "Appendix B" attached including the pertinent SDPUC Orders.

¹⁶ See *In the Matter of the Filing by Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order, Docket TC97-184, "Appendix B" attached.

¹⁷ Twelfth Report and Order, ¶ 149.

accept the SDPUC's designation was consistent with its prior statement in such Notice that "[a]ny carrier that is able to be or has already been designated as an eligible telecommunications carrier by a state commission is not required to receive such designation from the Commission." *Emphasis added.*¹⁸

Clearly, the SDPUC is "able" to make a designation of WWC covering the entire State of South Dakota, including the Pine Ridge Reservation. The SDPUC has already made similar designations and WWC, prior to this time, has never contested the SDPUC's authority to make an ETC designation extending to tribal lands. In view of the Commission's earlier decision validating the SDPUC's designation of CRST, it would be illogical for the Commission to conclude at this time that it may properly address WWC's petition for designation under Section 214(e)(6). A decision to proceed on WWC's filing in this case, would necessarily imply that CRST should also have been designated by the FCC under Section 214(e)(6) (and not by the state commission). It would also seemingly affect the SDPUC's earlier designations of GWTC and Fort Randall as ETCs. As earlier noted, GWTC and Fort Randall, non-tribal carriers providing service on the Reservation, have already been granted ETC designation for their entire service areas. This being the case, if the Commission assumes authority to act on the WWC petition under Section 214(e)(6), what would be the status of these earlier SDPUC designations which also cover areas that are part of the Pine Ridge Reservation? Would GWTC and Fort Randall also, then, have to make a filing with the Commission for ETC designation under Section 214(e)(6)? Action by the Commission accepting the WWC filing might also have an affect on the SDPUC's ability to continue its regulation under state statutes of GWTC and Fort Randall as local exchange carriers, to the extent that their services are provided on the Pine Ridge Reservation.

¹⁸ Twelfth Report and Order, ¶ 149, citing Public Notice released December 29, 1997, FCC 97-419, *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*.

Whether intended, or not, a decision by this Commission to proceed on WWC's petition for ETC designation would imply that the SDPUC lacked authority to make the earlier ETC designations. It also would directly interfere with the already pending state ETC designation proceedings initiated by WWC that are statewide in scope. If the Commission accepts WWC's petition filed under Section 214(e)(6), unquestionably it would impact the state proceeding and would call into question other ETC designations already made by the SDPUC. Such action would infringe upon state authority that has already been exercised and would lead to a result not intended by Congress in enacting the Section 214(e)(6) provisions.

WWC argues in its petition that this Commission may consider and grant its instant petition despite the pending state ETC proceedings. Specifically, WWC contends that Commission action on the instant petition would be proper because its service offering targeted to the Pine Ridge Reservation "differs substantially from its proposed offering for the rest of South Dakota."¹⁹ WWC goes so far as to argue that the instant petition for designation "would be necessary regardless of the ultimate outcome of the South Dakota PUC proceeding."²⁰ SDITC disputes these claims. As earlier mentioned, a state circuit court has already concluded that WWC has met the requirement to offer and advertise the federally supported telecommunications services on a statewide basis, and the information provided in WWC's instant petition indicates that the wireless service at issue is the same fixed wireless service (it is offered through the same technology/equipment described in the SDPUC proceedings).²¹ If ultimately the state circuit court decision is upheld by the South Dakota Supreme Court and this Commission concludes that it has no jurisdiction pursuant to Section 214(e)(6), would WWC still maintain that a separate petition for the Pine Ridge Area is necessary and make a new filing with the SDPUC? Certainly, it is

¹⁹ WWC Petition, p. 18.

²⁰ WWC Petition, pp. 18 and 19.

²¹ See WWC Petition, pp. 6, 7, 16, 20, 24; and SDPUC Docket TC98-146, Findings of Fact and Conclusions of Law, Notice of Entry of Order, pp. 2, 3, 4, 5, 7.

possible, depending on the specific rates, terms and conditions WWC offers to consumers, that the company's Pine Ridge offering, as compared to its statewide offering, could present different public interest considerations, but SDITC doubts whether this would dictate or require any new or separate ETC designation proceedings before the SDPUC. WWC has already filed a petition seeking statewide designation and, more specifically, WWC has claimed in the state appeal proceedings that any decision by the SDPUC on the public interest issue should be made on the existing administrative record. Having already made these claims, how can the company now, in good faith, argue that any designation request pertaining to its targeted Pine Ridge offering would require a separate state proceeding?

WWC suggests that this Commission's only purpose in adopting the requirement that there be no pending state proceeding is to guard against "forum shopping," and contends that its petition does not present any "forum shopping" concern. SDITC disagrees. From SDITC's perspective, it appears that WWC is working all the angles to increase its chance of success and that the company has absolutely no concern with the burdens brought on by duplicative federal and state proceedings. SDITC sees the WWC filing as a classic case of forum shopping and as a misuse of the Section 214(e)(6) process. WWC has already initiated a proceeding in South Dakota requesting a designation covering all areas of the State. Based on the petition filed in this case, it now appears that the company believes it will be better served if it is able to entirely circumvent the state ETC designation process. With the filing of its petition under Section 214(e)(6), WWC is attempting to prevent the SDPUC from making the "public interest" determination that would still have to be made for rural service areas, regardless of what the South Dakota Supreme Court

ultimately decides.²² This is despite the fact that the SDPUC, the South Dakota courts, and other parties, have already spent considerable time and expense on WWC's state petition, and despite the fact that evidence specific to the public interest issue was presented by WWC in the state proceeding.

SDITC opposes any use of the process under Section 214(e)(6) of the Act as a means of precluding the SDPUC from addressing the public interest issue as it relates to a possible additional ETC in the service areas of GWTC and Fort Randall. State commissions, rather than the FCC, are given the primary responsibility under federal law to make ETC designations and this delegation was based on Congress' recognition that state commission's can more reliably make the necessary factual determinations relating to state and local public interest issues. The instant filing by WWC under Section 214(e)(6) attempts to take the public interest determination away from the SDPUC and turns on its head the process envisioned by Congress for ETC designations. The Commission in this process has called for only written comments from interested parties on the various issues raised by WWC's petition, including the public interest issue. To the extent that the process is limited to only a review of un-sworn written comments, it is ill suited for addressing disputed factual issues and making factual determinations. In contrast, the SDPUC would be in a position to take additional factual evidence on the public interest issue through a contested case hearing process and would have the ability to actually test the credibility and weight of the related evidence.²³ In addition, the SDPUC has the benefit of being familiar

²² The issues raised in the South Dakota appeal proceedings relate only WWC's compliance with the ETC service obligations. The SDPUC has not yet made any determination as to whether or not granting ETC designation to WWC in rural service areas would be in the public interest.

²³ WWC in the South Dakota Supreme Court proceeding has claimed that the SDPUC should be required to make the public interest determination applicable to rural service areas on the existing administrative record. SDITC has challenged this claim on appeal and asked the Court to clarify whether the SDPUC, at its discretion, may hold another hearing to take additional evidence.

with the local history and circumstances, which puts it in a much better position to make the right determination for South Dakota consumers.

Even if WWC could make a credible claim that it has not engaged in “forum shopping”, this Commission should dismiss the instant petition. In limiting the Section 214(e)(6) process to only those cases where there is no state proceeding pending, the Commission also noted concern with the “costs and confusion caused by a duplication of efforts between this Commission and state commissions.”²⁴ Moreover, the limitation adopted by the Commission has a broader purpose. It is designed to prevent interference with existing state proceedings and keep any proceedings conducted under the Section 214(e)(6) provisions consistent with the intent of Congress. As acknowledged by the Commission in its Twelfth Report and Order, the provisions of Section 214(e)(6) are not intended to “restrict or expand the existing jurisdiction of State commissions over any common carrier.”²⁵ The Commission’s decision to “not make a jurisdictional determination under Section 214(e)(6) if the affected state commission has initiated a proceeding in response to a designation request under section 214(e)(2),” was necessary to meet the intent of the law. Contrary to WWC’s claims, there is no justification for making any exception in this case and accepting the WWC filing.²⁶ The filing should be dismissed given the already initiated South Dakota proceeding.

²⁴ Twelfth Report and Order, ¶ 126.

²⁵ Twelfth Report and Order, ¶104.

²⁶ Based on its requirement that there be no pending state proceeding, the Commission in its Twelfth Report and Order, took action to dismiss a petition filed under Section 214(e)(6) by Smith Bagley, a carrier seeking ETC designation in certain areas within the states of Arizona and New Mexico. At the time of Smith Bagley’s filing to the FCC, both the Arizona and New Mexico Commissions were currently considering section 214(e)(2) designation requests.